SHIP SUBSIDIES AND SUGAR BOUNTY STATUTES: THEIR CONSTITUTIONALITY.

During the last few years, the advisability of granting subsidies from the national treasury to American shipbuilders has become a political issue of considerable importance.[1] It is well to remember, however, before advocating the passage of any bill with that end in view, that the United States Supreme Court has never yet decided that Congress has the power to appropriate money for such a purpose. In fact, the condition of the authorities bearing on the subject is now such that it may reasonably be asked, whether, if a bill were passed providing for the distribution of bounties among shipowners, shipbuilders, or other manufacturers, and the validity of such an act were properly called into question, the law might not be declared unconstitutional and the payment of the bounties invalid. It is the purpose of this article to consider the subject and to state and discuss the authorities upon which this inquiry is founded.

It should be said at the start that the writer has no intention of calling into question the constitutionality of payments made by the Federal government to owners of fast steamers employed in carrying the mails, under contracts entered into with the lowest responsible bidder.[2] Such payments are an item of expense properly incurred under the clause of the Federal Constitution which gives to Congress the control of the national postal service (Art. I, Sec. 8, Par. 8), and by implication imposes on that body the duty of rendering the postal system efficient. They are the price paid by the government for services given to it in its capacity as employer. But the proposed national

[1] Speech of Hon. W. Bourke Cockran, New York, July 4, 1902; speech of Hon. Leslie M. Shaw, Oct. 18, 1902; W. L. Marvin, Scribner's Mo. Mag. (Nov., 1902), vol. 32, p. 582. Senate Bill, No. 1348, Title II, (H. R. 4564), 57th Cong., 1st Sess. While the payments provided for by Title II of this bill are to be made to shipowners, yet the real object of the act, as is generally understood, is "to supply * * * a market for American ships and an incentive to American shipbuilding." Cf. Report of the Committee on Commerce, S. Rep. No. 201, page 20; Senate Bill, No. 1348, section 17. The constitutional aspects of this measure are the same, whether the subsidies are deemed to be paid to the shipbuilders or to the shipowners. See *infra*, page 529.

[2] Act of March 3rd, 1891. Printed in S. Rep. 201, *supra*. cf. Senate Bill, No. 1348, section 1.

bounties to shipowners, and through them to shipbuilders, are of a different nature. They are essentially gratuities intended to hasten the development of a particular branch of American industry.[1] In the case of these bounties, therefore, new considerations apply when we seek to pass upon their constitutionality.

The question as to the powers of Congress in this connection arose once before a few years ago with regard to a provision of the McKinley Bill. That act, which became a law October 1st, 1890, provided for the payment of a bounty to sugar manufacturers.[2] The clause providing for the payment of this bounty was made the basis of the contention by counsel in an important case that the whole statute was unconstitutional, and that consequently no

[1] The provision made by section 14, "that a vessel which has at any time received compensation pursuant to any of the provisions of this act shall not be sold, except by the consent of the Secretary of the Treasury, to a citizen or subject of a foreign power, under penalty of forfeiture," does not keep the subsidies provided for by this bill from being gratuities. The amount of these subsidies is adjusted without reference to the value of this restriction. The restriction is not bought for a fair price; it is simply attached to a system of subsidies arranged because of the high wages demanded by American shipwrights and seamen. Perhaps a law might be validly enacted providing specially for the imposition of such a restriction, in return for a reasonable sum, in connection with a statute giving to foreign-built vessels the privilege of American registry. Cf. U. S. R. S. § 4172.—The fact that recipients of these bounties, (or subsidies as they are ordinarily called in connection with the Shipping Bill), must agree to sell their ships to the Government at a fair valuation when required "for the national defense or for any public purpose at any time" (Senate Bill 1348, section 11; Senate Report, No. 201, page 28) does not impose a burden on the shipowners. The same ships could be taken by the Government on the same terms in the exercise of the right of eminent domain. Cf. U. S. Const. Amd't V. The fact that there are not now many ocean going ships flying the American flag which could be requisitioned by Congress in the exercise of this power does not prove that bounties are constitutional, but rather that the United States registry laws should be changed. While American capitalists are buying ships abroad in large numbers other governments, not our own, by our own laws, are constantly being given the opportunity to exercise the right of seizure to our possible disadvantage in time of war. U. S. R. S. § 4132. The special act of Congress approved May 10, 1892 (Suppl. to U. S. R. S. vol. 2, p. 19) which allowed the foreign built steamers "City of New York" and "City of Paris" to be admitted to United States registry had important and beneficial results during the war with Spain when these two ships were rechristened the "Harvard" and "Yale" and used as cruisers.—The provisions in sections 9 and 10 of the bill (see Senate Report, No. 201, p. 27) relating to the carriage of mail bags and boy apprentices free of charge, whenever the Postmaster-General and the Secretary of the Treasury impose this requirement on the shipowners, in reality amount to this: that these officers shall have the power to distribute bounties at their discretion. For non-insistence on such gratuitous service would result in the payment by the Government of money without a corresponding return.

[2] 26 Stat. at L. 583, Par. 231.

import duties could be legally collected in accordance with the terms of the act.[1] The Supreme Court, however, refused to meet the issue thus presented. It took the ground that the bounty clauses of the act were independent, and separable from the provisions relating to the collection of revenue, and so it simply sustained the collection of the duties, while it refrained from deciding the point as to the constitutionality of the bounty. In United States *v.* Realty Company,[2] the validity of the bounty clause in the act of 1890 was again attacked, and again the Court found that a settlement of the question was not necessary to the decision of the case, although Mr. Justice Peckham referred to it as being "of the very gravest character." In Field *v.* Clark, Mr. Justice Harlan had said:

"It would be difficult to suggest a question of larger importance, or one the decision of which would be more far reaching."[3]

It is to be remembered at the outset that there is no clause in the Federal Constitution which specifically prohibits the payment of bounties. But another fact should also be noted, viz., that money controlled by Congress, save in a few rare instances, is always the product of taxation. Hence an important rule stated by Mr. Justice Miller, when considering the validity of contracts entered into by municipal corporations, would seem logically applicable to appropriations made by Congress. Said Mr. Justice Miller:

"Debts contracted by municipal corporations must be paid if paid at all, out of taxes which they may lawfully levy. * * * It follows that in this class of cases the right to contract must be limited by the right to tax."[4]

So we may properly say of Congress that its right to appropriate money is limited by its right to tax.[5] As Mr.

[1] Field *v.* Clark (1892) 143 U. S. 649. [2] (1896) 163 U. S. 427.

[3] At page 695. Attention has been called to the dangerous tendency which has found expression in the scheme for progressive inheritance taxes (W. D. Guthrie: The Fourteenth Amendment (1898), 122–142). Perhaps the economic results springing from a system of free distribution of public funds would be equally harmful.

[4] Loan Association *v.* Topeka (1874), 20 Wall. 655, at p. 659. Cf. *infra*, page 535.

[5] The theory that the power of Congress, of a State legislature, or of a municipal corporation, to contract, is ordinarily restricted by its power to appropriate money, and that this power, in turn, is confined within the same limits as the power to tax, supplies an answer to the line of argument advanced by Parker, C. J., dissenting in the important case of Peo. ex rel. Rodgers *v.* Coler, (1901) 166 N. Y. 1, 26–29.

Justice Harlan remarked in Field *v.* Clark, the determination of the question regarding the validity of a Federal bounty statute must depend

"principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress 'power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.' Art. 1, § 8."

Thus the question of the constitutionality of a national bounty statute really resolves itself into an enquiry as to the nature and scope of the taxing power of Congress.

Manifestly, the grant of the power to tax vested in Congress by the Federal Constitution should be construed so as to allow the interpretation given it to harmonize with generally accepted definitions of the terms there used. Now, the meaning of the words "power to lay taxes" in American law has repeatedly been considered by judges and writers in connection with the exercise of the taxing power by State legislatures. These judges and writers have said again and again, it is believed with unanimity, that in this country

"the power to tax * * * in its essence is the power to raise money from the public for the public."[1]

Judge Cooley, in his treatise on the American law of taxation, wrote:[2]

"It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose."

A State tax, therefore, to be valid, must be levied for a public purpose. This is an axiom in American constitu-

[1] Attorney-General Olney in the Income Tax cases,—Pollock *v.* Farmer's Loan and Trust Co., (1895), 157 U. S. 429; L. C. Pub. Co. Rep., vol. 39, page 790.—"Under American forms of government * * * two limitations upon the power of taxation are supported by sound judicial authority, and are to be implied when not expressed; first, the object of imposing the burden must be a public one. * * *" Mr. James C. Carter, id. page 795. See cases cited id. page 1112; also Bush *v.* Supervisors, (1899), 159 N. Y. 212, 216. See cases cited, p. 214.

If the remarks of Earl, J., in Sweet *v.* City of Syracuse (1891), 129 N. Y. 316, 348, are to be understood as meaning that under Art. I, sec. 9, of the constitution of 1846, (Art. III, sec. 20 of the constitution of 1894), the New York Legislature can appropriate money for a private purpose, provided the law is passed in a particular way, his opinion would seem to be at variance with the latest decisions of the Court of Appeals.

[2] 2nd ed. (1886), page 55; and Ch. IV. Cf. Am. & Eng. Cyc. of L. (2nd ed.) IV, 869, article "Bounties."

tional law: State levies for private purposes are illegal, or extortion under the forms of law.[1]

The courts, both State and Federal, have recognized the maxim just announced and have applied it repeatedly,[2] when considering the acts of State legislatures, but the chief difficulty confronting them has ever been the necessity of deciding what is, and what is not, a public purpose. Hitherto, no judge has attempted to give an all inclusive definition of the term. Statutes have been considered separately, and passed upon each on its own merits. Nevertheless, some judges have expressed general opinions as to certain classes of purposes which were certainly not to be deemed "public." These opinions are founded upon cogent reasoning and would seem to represent the law. In Loan Association *v.* Topeka, Mr. Justice Miller declared, when deciding that a State could not empower a town to issue bonds in aid of manufacturers:

"There is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor."[3]

In Lowell *v.* Boston, Wells, J., said:[4]

"The promotion of the interests of individuals in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object."

And Campbell, C. J., in People *v.* Township Board of Salem, said:[5]

"Where an enterprise is conducted by private persons for their own private benefit, the public authorities having no control over the expenditure and no share in the profits, it is a private enterprise and not a public one, whether large or small and whether profitable or unprofitable."

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[1] The origin of this maxim will some day, in all probability, be made the subject of very careful historical investigation. It would seem to date back, in spirit at least, to Calder *v.* Bull (1798), 3 Dall. 386, per Chase, J. It was perhaps first applied in Sharpless *v.* Mayor (1851), 21 Penn. St., 147, 168, per Black, C. J. See on this rule of law, Cooley's Constitutional Limitations (3rd ed., 1873), pp. 487-494.

[2] See, besides cases cited in other notes: U. S. *v.* Carlisle, (1895), 5 App. Cases (D. C.) 138, dealing with act of October 1st, 1890; McConnell *v.* Hamm, (1876), 16 Kan. 228, per Brewer, J.; Matter of Greene (1901), 166 N. Y. 485; Matter of Chapman (1901), 168 N. Y. 80; Matter of Mahon (1902), 171 N. Y. 263. [3] 20 Wall., at page 666.

[4] (1873) 111 Mass. 454, 461.

[5] (1870) 20 Mich. 452, 495. Bounties to wolf hunters are given for a public purpose, viz: the destruction of the common enemy (*ibid*; and Ingram *v.* Colgram (1895), 106 Cal. 113, 123; Cooley on Tax., page 138). Bounties to soldiers for enlistment, provided for by State statute prior to the time of service, are also given for a public purpose. See Cooley on Taxation, pages 111, 136.

The scope, therefore, of the taxing power of Congress, when viewed in the light of previous rulings as to the extent of the taxing power vested in the State legislatures, would seem to be limited. One limitation would appear to be inherent in the very nature of the power, for every definition of the extent of that power vested in the State legislatures contains a statement of the limitation. A tax must be for a public purpose. Frequently State laws have been declared unconstitutional on this ground, even when no special prohibitory clause could be found in the State constitution preventing the disbursement of State or municipal funds for private objects. To that extent, our courts, both State and Federal, have recognized the existence in the several States of unwritten constitutions, restricting the legislatures in the exercise of their vast and undefined powers.[1] Now, inasmuch as Congress has only the powers specifically given to it by the Federal Constitution, it would seem reasonable to suppose that the Supreme Court might well declare unconstitutional an appropriation made from the national treasury for a private purpose. Too much reliance, therefore, should not be placed by capitalists on the proffered assistance of the Federal government, through a system of bounties. For if Congress should ever provide for the payment of bounties, directly or indirectly, to shipbuilders, sugar refiners or wool growers, or any other class of manufacturers or farmers, out of funds raised by taxation, such appropriations probably could not bear the test of judicial scrutiny.[2]

[1] Michigan Sugar Co. *v.* Auditor General (1900), 124 Mich. 674, 678. For opinions *contra* see J. B. Thayer (1893), VII Harv. Law Rev. 129; Clifford, J., dissenting, in 20 Wall,, at page 669; S. and V. R. R. R. Co. *v.* City of Stockton (1871), 41 Cal. 147; E. McLain, XV Harv. Law Rev. 531 (1902). Cf. Cooley on Tax., page 54; Simeon E. Baldwin, J., in State *v.* Traveler's Ins. Co. (1900), 73 Conn. 255, 283; Ingram *v.* Colgram, *supra;* and page 528, note 1.

[2] It is believed that the system of bounties paid by the national government to deep-sea fishermen from 1792 to 1807, and again from 1813 to 1866, has never been judicially passed upon and is unconstitutional. See Sen. Reports, No. 201, 57th Cong., 1st Sess., appendix; and see Senate Bill, No. 1348, Title III, 57th Cong., 1st Sess. If it be desirable to increase the number of men and boys fitted to enlist as qualified seamen in the United States Navy the Public Marine School system should be extended. (See Laws of New York, 1861, ch. 253; 1873, ch. 288; Act of Congress approved June 20, 1874, as amended in 1881; Laws of Massachusetts, 1891, ch. 402; Annual Reports of the Board of Education of the City of New York and of the Commissioners of the Massachusetts Nau-

At this stage the interesting question is presented whether or not, in case a national bounty bill were passed and payments were actually made in accordance with its

tical Training School; By-Laws of the Board of Education, City of New York, as adopted March 26, 1902, sections 59–63; New York Legislature, Bill No. 175,770, introduced by Senator Cantor Jan. 21, 1895, and vetoed). It is believed that the work done by these schools has not yet been adequately described, and that full statistics in regard to them have not been compiled. A national appropriation in aid of these schools could be made under Art. 1, Sec. 8, Par. 13, U. S. Const., which gives to Congress the power "to provide and maintain a Navy." While Congress cannot constitutionally subsidize fishermen it can establish schools for naval officers and seamen, and with propriety help our states and cities to support such schools.—"Opportunity, not Subsidy," is what we need. See protest made by Merchants' Association of New York City before the Rapid Transit Commission, October 2, 1902.

Our State legislatures, and Congress, can influence the economic development of the country through tax laws by making exemptions from taxation and adjusting tariff schedules. Whether the State and Federal constitutions should be amended so as to allow the establishment of a valid system of bounties is an economic question of importance. The seemingly unsuccessful experiments of France and England during the last few years are worth considering. A novel system of ship subsidies in Russia has recently been described. See U. S. Consular Reports (1902), vol. 69, pp. 253, 404; vol. 70, p. 218. Cf. speech of Sir Spencer Walpole, cited N. Y. *Evening Post*, Oct. 18, 1902.

While the principal object of this article is the consideration of a problem of national importance, it may be fitting at this point to call attention to some recent State legislation which seems invalid. By chapter 500, L. of 1897, the New York Legislature appropriated $25,000 for distribution among manufacturers of beet root sugar within the State. This appropriation has been followed by others regularly each year, until now a large sum is thus annually distributed. The total of these appropriations has to-day reached the sum of $300,000. (LL. 1898, ch. 191; 1899, ch. 13; 1900, ch. 344; 1901, ch. 331; 1902, ch. 240; see also L. 1902, vol. 2, p. 1712.) Tested by the general principles already stated, they are unconstitutional. Furthermore, there is in New York a special clause of the State constitution which bears directly on the point. Sec. 9, Art. 8, reads as follows: "Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking." The meaning of this clause is perfectly clear. It was adopted in 1874 at a time when the people of the State were suffering from the effects of numerous bond issues authorized in aid of private railroad corporations. Sec. 9 of Art. 1 of the old constitution of 1846 had been interpreted so as to permit the legislature to launch into grievous excesses. The amendment of 1874 was then added to the constitution (Matter of Chapman, *supra* p. 529 n. 2. at page 84; cf. 1 Col. Law Rev. 316). Its provisions should be respected.

In 1900 the Michigan Supreme Court declared a State sugar bounty statute unconstitutional. (Mich. Sugar Co. *v.* Auditor General, *supra*). A list of sugar bounty statutes recently passed in other States is given in the New York *Tribune* of March 31, 1902. It may well be that the beneficiaries of the New York sugar bounty acts owe to the people of the State all the sums they have received. See text. "Duties of the Attorney General," Executive Law, § 52. Actions to recover the amount paid out should be brought before the statute of limitations is a bar.

As to whether the system of premiums paid to private agricultural societies under §§ 88–89 of the New York Agricultural Law (L. 1902, vol. 2, pages 1243 and 1659, cf.) is constitutional: *quære*.

provisions, money thus distributed would be lost to the taxpayers. If the recipients of the bounty could keep the money paid, large sums would probably be expended in an unconstitutional manner. From a practical point of view, it is perhaps as important to know the rights of the parties under such circumstances as to decide whether or not a bounty act would be constitutional in the first instance. The matter can be considered under two aspects: First, by inquiring whether the Attorney General could sue to recover the money; secondly, whether Congress could do anything by supplemental legislation to assist the beneficiaries of its generosity.

In the first place, it seems evident that an action would lie on behalf of the people to recover money paid out under an unconstitutional bounty statute. It could hardly be argued in such a case that the money was paid out from the public treasury voluntarily, under a mistake of law. For the State has no agents for unconstitutional purposes, and when officials disburse money in compliance with the terms of a void statute, they clearly act beyond the scope of their authority. Money thus distributed is taken from the people, and is not paid out by them under a mistake of law. The acceptance of bounties from Congress, therefore, would be attended with the risk of a possible action brought by the law department of the government.[1]

Perhaps, however, a successful appeal could be made to the sympathy of Congress, and a bill passed to reim-

In Ramsey *v.* Hoeger (1875), 76 Ill. 432, it was held that the individual tax-payer could refuse to recognize his annual taxes to an amount equal to his proportionate share of the sum appropriated by the State through an unconstitutional statute.

As to whether an injunction would lie to restrain the treasurer of a State or of the United States from paying out unconstitutional bounties: *quære*; see Peo. *v.* Canal Board (1874), 55 N. Y. 390; Thompson *v.* Commr's (1855), 2 Abb. Pr. (N. Y.) 248; Wood *v.* Draper (1857), 4 Abb. Pr. (N. Y.) 322; Kilbourne *v.* St. John (1874), 59 N. Y. 21; Hills *v.* Peekskill Savings Bank (1882), 26 Hun (N. Y.) 161; Osterhout *v.* Hyland (1882), 27 Hun (N. Y.) 167; Crampton *v.* Zabriskie (1879), 101 U. S. 601. Beach on Injunctions (1895), § 1225. Most of the cases relate to injunctions against municipalities, but see Rose's Notes on the United States Reports (1901), XII, 614; XIII, 915; and Western Union Telegraph Company *v.* Norman (1896) 77 Fed. 13, in which an injunction was granted restraining the State auditor of Kentucky from collecting an unconstitutional tax and from certifying to the several county clerks the proportion of the tax due from each county.

[1] Cf. U. S. R. S. § 376.

burse those business men who had sustained loss through reliance placed on the regular payment of bounties. Would such a statute be constitutional?

Once already Congress has enacted such a law. In 1894, certain manufacturers who counted on the distribution of the sugar bounties during that year, under the act of 1890, suffered heavily owing to the repeal of the McKinley Bill by the act of August 28, 1894. For their benefit, the act of March 2, 1895, was passed.[1] It provided that bounties already earned during 1894 were to be paid forthwith, though no bounties were allowed for future years. The Supreme Court in United States *v.* Realty Company, sustained the act of 1895, though expressly refusing to pass on the constitutionality of the original bounty act of 1890.[2]

The decision of the court in United States *v.* Realty Company is open to the objection that it seems to allow the accomplishment indirectly of what is probably unconstitutional.[3] The reasoning of the court may fairly be criticized. The first ground on which the decision is placed is the well-known doctrine that the law-making body can properly pay debts of honor incurred by the nation. Now it is true, that ever since the New York Court of Appeals decided Guilford *v.* Supervisors in 1855,[4] the rule has been recognized that the discharge of an obligation only morally binding upon a State or municipal corporation can be made the valid basis for a State or a local tax, and the rule against the payment of gratuities out of money raised by taxation is not deemed to be infringed upon by the satisfaction of such a debt. But in no case prior to United States *v.* Realty Company was the moral obligation so dis-

[1] 28 Stat. at L. 910, 933. [2] Cf. *supra*, p. 527.

[3] The decision in 163 U. S. may account for the insertion of the following clause in the New York bounty statutes of 1898 and following years: "This appropriation is made by the legislature in continuation of the policy adopted at the session of 1897, in the faith and with the declared purpose of making direct appropriations from the State treasury for a successive period of not less than five years from said first appropriation, in aid of the permanent establishment of the beet sugar industry in New York."

This promise would form the basis of a moral obligation which could be paid according to United States *v.* Realty Company. In East Saginaw Salt Mfg. Co. *v.* City of East Saginaw (1871), 13 Wall. 373, it was held that a State bounty statute can never form the basis of a contract protected by the contract clause of the Federal Constitution (Art. I, Sec. 10, par. 1).

[4] 13 N. Y. 143.

charged through taxation, one for whose creation the law-making body could not constitutionally have provided in advance. For example, the statute interpreted by the court in Guilford *v.* Supervisors looked to the payment, through a tax, of certain expenses of administration incurred by town commissioners, clearly for a public purpose and of such a nature that they could unquestionably have been voted out of tax funds before being incurred. In none of the cases which preceded the ruling of United States *v.* Realty Company did the judges violate the great principle of the law of ratification, applicable to legislative action, viz., that the power to cure extends no further than the original power to authorize.[1] That principle was apparently disregarded in United States *v.* Realty Company, and for that reason, primarily, the decision cannot be commended.

[1] See Kimball *v.* Rosendale (1877), 42 Wis. 407; Mattingly *v.* District of Columbia (1878), 97 U. S. 687; Cooley on Tax., 302, note, 305. Cf. the remark of Rapallo, J., in Cole *v.* State of New York (1886), 102 N. Y. 48, 54: "Where the creation of a particular class of liabilities is prohibited by the constitution, it would, of course, be an infraction of that instrument to pass any law authorizing their enforcement." In Brown *v.* Mayor (1875), 63 N. Y. 239, 244, Andrews, J., said: "The power of the legislature to ratify a contract entered into by a municipal corporation for a public purpose, which is *ultra vires*, results from its power to have originally authorized the very contract which was made. * * * In this case, as the legislature could have authorized this contract without previous advertisement or competitive bidding, it may affirm the contract although made originally without authority of law." In Mayor *v.* Tenth National Bank (1888), 111 N. Y. 446, 459, Earl, J., said: "It is further claimed that the legislature was not competent to ratify these advances and make them a binding obligation on the county. It is said that it could not originally have authorized advances to be made to the conspirators for fraudulent division among themselves, and that hence it could not ratify such advances. This may be conceded; but here these advances were made in good faith, not to be divided among the conspirators, but to and for the use of the county. This the legislature could have authorized * * * and what it could originally have authorized it could ratify and confirm." In O'Hara *v.* State, (1889) 112 N. Y. 146, 151, Ruger, C. J., said: "It was undoubtedly within the province of the legislature originally to have provided for the rendition of these services and the purchase of materials for the use and benefit of the quarantine station, and it is equally clear that it could by subsequent legislation ratify and approve any act performed for the benefit of the State, which it had original authority to legislate and provide for." In Wrought Iron Bridge Co. *v.* Town of Attica, (1890) 119 N. Y. 204, 211, O'Brien, J., said: "The principle that claims, supported by a moral obligation and founded in justice, where the power exists to create them, but the proper statutory proceedings are not strictly pursued, or for any reason are informal and defective, may be legalized by the legislature and enforced either against the State itself or any of its political divisions through the judicial tribunals, is, we think, now well settled." See also Matter of Reynolds (1891), 48 N. Y. St. Rep. 627; Cayuga County *v.* State (1897), 153 N. Y. 279.

There is another reason, too, why the case is open to criticism. The court bases its judgment in part on the authority of Emerson *v.* Hall (1839) and of Williams *v.* Heard (1890), both of them cases dealing with statutes which distributed funds not raised by taxation.[1] Now, as Mr. Justice Miller pointed out,[2] the question as to what can be done with funds collected from sources other than taxation is entirely different from the one as to the legitimate use of money raised from the tax-paying public. So land bounties may be validly granted to our transcontinental railroads because the land given is not the product of taxation, and rules of the law of taxation are not applicable in such a case.[3] But the validity of these gratuitous land grants and the constitutionality of the particular statutes referred to in Emerson *v.* Hall and Williams *v.* Heard, distributing funds in recognition of moral claims, proves nothing in regard to the validity of payments made from money raised by taxation, whether as original bounties or in recognition of supposed moral claims arising through the termination of a bounty statute.

For these two reasons, then, the soundness of the decision in United States *v.* Realty Company may reasonably be questioned. It is doubtful, therefore, whether a remedial statute similar to the one passed in 1895 would ever again be sustained, and, that being so, the position of capitalists who accept bounties from the national treasury would seem to be precarious from every point of view.

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[1] The first case (38 U. S. 409) construed the act of March 3, 1831, which distributed the proceeds of the sale of the brig Josefa Segunda, seized at New Orleans in April, 1818, for a violation of the laws prohibiting the importation of slaves. The second case (140 U. S. 529) construed the act of June 5, 1882, which disposed of the money awarded to the United States by the Geneva Tribunal in settlement of the Alabama claims.

The payment of the French spoliation claims (Act of March 3, 1891; 26 Stat. at L. 897, 908, Ch. 540; see Blagge *v.* Balch (1895), 162 U. S. 439) out of tax funds would seem to be valid, because the government could properly have bought up those claims before entering into the treaty with France of September 30, 1800 (8 Stat. at L. 178).

[2] Loan Association *v.* Topeka, *supra.*

[3] Cf. grant to Union Pacific Railroad Co. (1862), 12 Stat. at L. 489. See Am. & Eng. Cyc. of Law (1st ed.), Vol. 19, pp. 336–339. As to whether ship subsidies, or bounties, could be constitutionally paid out of a fund raised by the sale of public lands: *quære.* As to whether seeds, purchased with money raised by taxation, can be constitutionally given away by the Department of Agriculture: *quære.* The amount appropriated for this purpose in 1901 was $170,000. See Year-book of Department of Agriculture (1900), pages 31, 636. This appropriation was constitutional only if made for educational purposes. In so far as the expenditure represented a system of bounties to farmers it was illegal.